United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7230

To be argued by
DORIS K. SHAW

United States Court of Appeals

For the Second Circuit

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SECOND CIRCUIT

WILLIAM J. SOLLOWAY,

Plaintiff-Appellant,

against

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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Docket No. 77-7230

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-against-

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Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

This is an appeal by plaintiff William J. Solloway ("Solloway") from the denial by the Honorable Robert J. Ward, United States District Judge, of plaintiff's motion to reopen and restore this case to the trial calendar

The parties thereupon engaged in extensive pretrial discovery (A 2, 39). Plaintiff served interrogatories, requested production of documents and deposed FINCAP's President and Chairman of the Board, Dr. William Haeberle (A 2). Throughout plaintiff's discovery defendants did not object to a single item, nor did plaintiff in any instance have to seek the assistance of the Court to compel discovery (A 2; see Defendants' Answers to Plaintiff's Interrogatories).

The parties also engaged in extensive out-of-court settlement negotiations (A 39; Tr. 13). Recognizing that relatively little guidance from the Court might enable a settlement to be consummated, the parties, on the eve of trial,* requested a conference before the Honorable Robert J. Ward. During that conference before Judge Ward, held on April 8, 1976, a settlement agreement was reached in open court (A 20-24).

The stipulation of settlement was read into the record at the April 8 conference by plaintiff's attorney, Carl Tunick.

> MR. TUNICK: It is hereby stipulated and agreed by and between the attorneys for the respective parties, with the appearances of the plaintiff in person, Mr. William J. Solloway, and the defendants by the corporate officer and partner, Dr. William Haeberle, that the within matter be settled upon the following terms and conditions:

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* The parties had filed a proposed pretrial order on December 17, 1975 (A 2).

following its settlement and dismissal with prejudice.

THE ISSUE ON APPEAL

Did the Court below abuse its discretion in denying plaintiff's motion to reopen this action which had been dismissed with prejudice pursuant to a settlement agreement?

STATEMENT OF THE CASE

A. Prior Proceedings

Plaintiff served as director, senior vice president and assistant secretary of defendant The First Indiana Corporation ("FINCAP") until early 1974 when he ended his association with FINCAP (A 7, 14-16, 39).* Plaintiff then filed this action on November 20, 1974, asserting several contractual claims against FINCAP for monies allegedly due him in regard to his former association with FINCAP, and joining as defendants on one of those claims two limited partnerships, Can-West 1972 Gas Partnership ("Can-West 1972") and Can-West 1973 Gas Partnership ("Can-West 1973") (A 4-11). Defendants filed their answer on February 4, 1975, denying plaintiff's allegations and asserting several affirmative defenses (A 12-18).

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* Page references to the Appendix are prefixed "A", and page references to the transcript of the hearing before Magistrate Raby are prefixed "Tr.".

One, the defendant [FINCAP] agrees to pay the sum of $30,000 to plaintiff by payment of $5,000 on or before May 10, 1976, the balance of $25,000 together with interest at the rate of 6 percent per annum in ten semi-annual installments with the first installment to be paid on the first business day of January 1977 and the remaining installments to be paid on the first business day of each succeeding July and January with the final payment to be made on the first business day of July 1981. At the time of each installment payment of principle (sic) there shall be a simultaneous payment of interest on the unpaid balance then outstanding at the above rate on (sic) interest.

Two, the parties have agreed that all recurring fees referred to in the written agreement of April 5, 1972 and fixed in that contract at 20 percent shall be now deemed to be 8 percent including payments to FINCAP from future transactions between FINCAP and Concept.

Three, upon completion of the payment of the $25,000 plus interest referred to in paragraph one plaintiff shall deliver 2500 shares of FINCAP to the defendant.

Four, the parties have agreed to arrive at a security instrument which will provide security for the plaintiff for the payments referred to herein to the extent possible by the defendant [FINCAP].

Five, in the event of a disagreement with respect to that security the parties shall have 30 days within which to put the case back on the calendar and try it.

Six, in the event of a default in the making of any payment required to be made hereunder after written notice by certified mail to the defendant, FINCAP, and such default continuing for ten days thereafter then, in that event, the plaintiff shall have the right to enter judgment with the clerk without further notice for the balance due under this stipulation.

Seven, in working out the security arrangement referred to above the defendants have agreed to furnish financial statements of the three defendants which while unaudited shall not be older than six months. And that such statements will

be furnished within two weeks from the date hereof; and which financial statements shall contain the statement that they are true and correct on the basis of whatever knowledge Dr. Haeberle has.

Eight, upon the payment of the initial $5,000 the parties shall execute general releases excepting from those releases the obligations under this stipulation and the releases shall be held in escrow by the defendant's counsel, Messrs. Donovan, Leisure, Newton & Irvine, until the payment of $30,000 shall have been completed at which time they may be delivered to the respective parties. (A 21-23).

The Court then specifically asked defendants' attorney, plaintiff, and defendant FINCAP's chief officer, respectively, if each agreed to the settlement as read into the record by plaintiff's counsel, and each indicated his agreement (A 23-24). The Court's interchange with plaintiff was as follows:

THE COURT: Mr. Solloway, I understand you are an attorney admitted to practice in Canada. I would first ask you if you agree to the settlement which has been set forth by counsel?

MR. SOLLOWAY: Yes, I do. I agree to the settlement. (A 23).

After the parties and defendants' counsel gave their assent to the settlement agreement set forth by plaintiff's counsel, Judge Ward approved the settlement and read into the record an order of dismissal:

The court having been advised by counsel for the parties that the above action, that is this action, has been settled it is ordered that this aciton (sic) is hereby dismissed with

> prejudice and without costs but without prejudice to the right upon good cause shown within 30 days to reopen the action if settlement is not consummated. (A 24).

The order was signed by the Court the same day (A 19).

Plaintiff thereafter received four extensions of 30 days each within which to complete the security arrangements of the settlement (A 19). Then, on September 1, 1976, during his fourth 30-day extension period, plaintiff moved, pursuant to the reopening provision of the order of dismissal, to reopen the action and have it restored to the trial calendar (A 25-26).* The motion was treated by Judge Ward as one seeking to reopen pursuant either to the terms of the agreement or, alternatively, under Rule 60(b), Fed. R. Civ. P. (A 38).**

In an opinion dated October 14, 1976, in which he discussed in detail the proceedings to date, the parties' contentions and the applicable law (A 38-44), Judge Ward found that the plaintiff's motion and his accompanying affidavit raised two factual issues:

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* Plaintiff's notice of motion filed on September 1, 1976 relied solely upon the reopening provision of the dismissal order (A 25). However, his brief, filed more than four weeks later on September 30, also relied upon Rule 60(b)(1), (2), (3) and (6), Fed. R. Civ. P. (A 2; see Plaintiff's Memorandum in Support of Motion to Restore to Calendar).

** The text of Rule 60(b), Fed. R. Civ. P., is set forth in its entirety in an Addendum annexed hereto.

> (1) Did the defendants make misrepresentations of their financial position, causing plaintiff to rely thereon, to his detriment, by agreeing to the provisions of the settlement? (2) Have the parties made a good faith effort to arrive at a satisfactory security arrangement? (A 39).

Judge Ward referred these two questions to the Honorable Harold J. Raby, United States Magistrate, to hold a hearing on the disputed factual issues and make recommendations to the Court (A 43-44).

Extensive discovery was had with respect to the disputed issues, and a hearing was held before Magistrate Raby on February 9, 1977 (A 55, 63). Plaintiff presented documentary evidence and testified at the hearing (Tr. 6-64).* Plaintiff expressly declined to call other witnesses, including defendant FINCAP's chief executive officer, Dr. Haeberle (Tr. 64, 68-69). At the conclusion of plaintiff's evidence, Magistrate Raby found that plaintiff had failed to establish his contentions and recommended to Judge Ward that the motion of plaintiff be denied in all respects (A 50-54, 55-56).

Plaintiff filed an objection to the findings and recommendations of the report of Magistrate Raby and requested a de novo review by the Court (A 57). Judge Ward, after

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* Plaintiff was represented by counsel at the hearing and at all times in this lawsuit prior to the instant appeal (Tr. 2).

a de novo review of the entire record, in an opinion and order dated April 11, 1977, overruled plaintiff's objections, adopted the recommendations of the Magistrate and confirmed his report, and directed the parties to consummate the settlement (A 62-73). It is from this order of Judge Ward, denying his motion, that plaintiff appeals (A 76).

B. Statement of Facts

Plaintiff's statement of "relevant facts" is misleading. Indeed, plaintiff's entire brief is filled with irrelevant biographical and historical data concerning the parties, averments as to plaintiff's mental impressions at the time of the in-court settlement negotiations and misstatements and unwarranted assumptions as to the actions and motives of defendants, defendants' counsel, Magistrate Raby and Judge Ward. Moreover, the vast majority of these so-called "relevant facts" are not documented by any citation to the record, nor could they be, since such "facts" cannot be found in the record below.

The only facts relevant to this appeal are plaintiff's contentions on his motion to reopen; defendants' response; the testimony given and the exhibits presented at the hearing; the terms of the settlement and the Court's order of dismissal, which are set forth supra at pp. 3-6; and the findings of Magistrate Raby and Judge Ward. In order to correct the record, defendants set forth here a brief summary of the parties' contentions and the findings below.

Plaintiff moved to reopen and restore this case to the trial calendar pursuant to the reopening provision in the order of dismissal (A 25-26). Plaintiff's supporting affidavit made scarce reference to the terms of the settlement agreement itself and was instead filled, as is his brief on appeal, with assertions as to his own impressions and understanding of the settlement agreement and what he had been told by unspecified persons (A 27-29). However, the essence of his charges was twofold. First, he alleged that he had not received the financial information from defendants which he had expected to receive and hence could not fashion a security arrangement. Second, he charged that Dr. Haeberle and defendants' attorney made representations to him during the in-court settlement negotiations as to FINCAP's lack of success and insolvency; that the financial information that he did receive from defendants after the settlement proved these representations to be false; and that he had been told (where and by whom are not stated) that if the financials did not support these representations, the case could be put back on the calendar (A 27-29).

In his reply affidavit, Mr. Solloway specified for the first time the precise content of the claimed representations which he then stated were made by Dr. Haeberle before Judge Ward. The alleged representations were that: (1) FINCAP required 5 years to pay the $30,000 settlement; (2) FINCAP would go into bankruptcy should it lose this

action; and (3) FINCAP's shares were of little or no value (A 36).

Defendants, in their response to plaintiff's motion to reopen the case, denied that the alleged representations had been made to plaintiff. Defendants stated that Dr. Haeberle had told plaintiff only that FINCAP's current cash position was not strong and that its future income was speculative, which statements were fully supported by the recent financials of FINCAP given to plaintiff (A 30-32).

The issues framed by Judge Ward to the Magistrate, and the subsequent findings of both Magistrate Raby and Judge Ward, dealt with each and every factual contention raised in plaintiff's moving papers (A 38-44, 50-54, 62-73). As to the plaintiff's contentions concerning the alleged misrepresentations, the Magistrate found that plaintiff's own testimony that he disbelieved and distrusted his opponents belied any claim of reliance by him upon any representations defendants may have made. He also found that plaintiff, aided by counsel, agreed to the settlement without prior condition and not subject to the receipt of financials. (A 52-53). As to the reopening provision, the Magistrate found that it was to be employed only if the parties were unable to frame a security arrangement with respect to

payments under the agreement, and that financials were to be supplied only to help frame an appropriate security agreement. He further found that while defendants had supplied plaintiff with the appropriate financials, plaintiff nonetheless had not pursued the security agreement, apparently unilaterally deciding at that point not to go ahead with the settlement but to pursue his fraud contentions instead.* The Magistrate concluded that, at most, defendants were late in supplying the financials needed to enable the preparation of a security agreement and that this was not a justification for opening the settlement in this case.(A 50-52).

Judge Ward reviewed the entire record de novo and confirmed Magistrate Raby's report (A 62-73). Quoting extensively from plaintiff's testimony before the Magistrate, the Court adopted all of the Magistrate's findings (A 62, 73). Moreover, the Court additionally found as to plaintiff's misrepresentation claims that plaintiff had not only failed to prove reliance, but had also failed to show that any misrepresentations were made by defendants (A 64-71).

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* In fact, plaintiff conceded at the hearing before Magistrate Raby that before the last extension of time within which to complete the security arrangement had expired, he had sufficient information to enable him to frame a security arrangement (Tr. 48, 49, 60).

ARGUMENT

It is well settled that a motion to set aside a judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial court and that the denial of such a motion will be reversed only upon a clear showing of abuse of discretion. E.g., Daily Mirror Inc. v. New York News, Inc., 533 F.2d 53 (2d Cir.), cert. denied, 429 U.S. 862 (1976); Sampson v. Radio Corp. of America, 434 F.2d 315 (2d Cir. 1970); Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F. 2d 114 (2d Cir. 1962); Parker v. Broadcast Music, Inc., 289 F.2d 313 (2d Cir. 1961). We submit that not only was there no abuse of discretion by the District Court in denying plaintiff's motion to reopen, but Judge Ward's and Magistrate Raby's findings are manifestly correct.

I.

PLAINTIFF'S TESTIMONY ESTABLISHED THAT THERE WAS NO FRAUD OR MISREPRESENTATIONS ENABLING HIM TO SET ASIDE THE SETTLEMENT PURSUANT TO RULE 60(b)(3).

Plaintiff cannot have this action reopened pursuant to Rule 60(b)(3). "In order to have a judgment set aside for fraud under this section, the fraud or misrepresentation alleged must be shown by clear and convincing evidence." Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., supra at 115. Accord, Clarion Corp. v. American Home Products

Corp., 494 F.2d 860, 865 (7th Cir.), cert. denied, 419 U.S. 870 (1974); Westerly Electronics Corp. v. Walter Kidde & Co., 367 F.2d 269 (2d Cir. 1966); Brown v. Pennsylvania Railroad Co., 282 F.2d 522 (3d Cir. 1960), cert. denied, 365 U.S. 818 (1961). Here, the plaintiff utterly failed to show by any evidence that he was induced to settle by fraudulent means.

In order to prove fraud or misrepresentation, three of the essential elements that plaintiff must establish by clear and convincing evidence are that (1) material representations were made; (2) which representations were false; and (3) upon which representations plaintiff justifiably relied to his detriment. E.g., Clarion Corp. v. American Home Products Corp., supra at 865; United States v. Franklin National Bank, 376 F.Supp. 378 (E.D.N.Y. 1973); Jones Memorial Trust v. Tsai Investors Services, Inc., 367 F.Supp. 491 (S.D.N.Y. 1973). As Judge Ward found, plaintiff's own testimony at the hearing before Magistrate Raby belied the existence of each of these elements.

First, as to whether any material representations were made to him by defendant FINCAP and its counsel, plaintiff admitted:

> [W]e made a settlement with no warranties or prejudices on the defendant's side as to what the status of the company was (Tr. pp. 15-16; A 66).

Second is the question of whether, if made, the alleged representations were shown to be false. As Judge Ward found, they clearly were not. As to the alleged representations concerning FINCAP's financial status in April of 1976, plaintiff, at the hearing, conceded that FINCAP's most recent audited financial statement (marked at the hearing as Exhibit 3) showed a negative net worth of $121,000 (Tr. 52-54). Furthermore, the same statement shows that as of January 31, 1976, FINCAP had current assets of approximately $15,000 and current liabilities of approximately twice that amount (A 65).* And, as to the representation concerning the value of FINCAP's stock, as Judge Ward found, the only evidence that the stock was worth $15 per share and not $2 was plaintiff's own non-expert opinion based upon "cash flow," and there was no evidence that plaintiff's opinion was more correct than Dr. Haeberle's (A 70-71).

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* Plaintiff evidently realizes that the financials show that the alleged representations as to FINCAP's financial worth were true, as he does not even attempt to explain any of those figures. Instead, in an effort to confuse the Court, he cites to Can-West 1972 and Can-West 1973 statistics and not those of FINCAP to support the alleged financial picture of FINCAP, the party that made the alleged representations and agreed to pay the settlement monies (Plaintiff's Brief, pp. 8-9). The Can-West 1972 and 1973 financials are those which, without a shred of support, plaintiff also accuses Magistrate Raby of ignoring (Plaintiff's Brief, Point I). There is, however, no doubt that Judge Ward did look at those figures in his de novo review of the entire record, since he expressly held that any future projections of earnings of the Can-West partnerships were irrelevant to the truth or falsity of alleged representations concerning FINCAP's ability to pay a settlement in April of 1976 (A 74, n.1).

Third, as Judge Ward independently found, even assuming arguendo that there were material misrepresentations made to plaintiff in regard to FINCAP's financial condition, plaintiff could not have justifiably relied upon any of those representations, as shown by his own testimony. Indeed, plaintiff repeatedly testified -- even in the face of Magistrate Raby's admonition to him that he was thereby conceding the motion -- that he did not believe or trust Dr. Haeberle, the party who allegedly made the very representations at issue:

Q Did you ask whether or not there were financials after the financials of '73?

A Yes, of course. I wanted to see financials.

* * *

Q Of whom did you ask for these financials?

A Dr. Haeberle.

Q When did you ask for them the last time?

A Asked him first thing at the trial or before the trial of April the 8th.

Q What did he say to you?

A "We don't have them."

Q "We don't have them here today"?

A They said, "We don't have them."

Q Were you told whether they existed or whether they were just not there in the court that day?

A I believe he said that they didn't have them, period. The inference being that they didn't exist.

MAGISTRATE RABY: That is your inference?

Q Right.
Were you ever told they didn't exist?

A I believe he said that since the company hasn't any money we haven't made financials.

MAGISTRATE RABY: Did you believe Dr. Haeberle, had he told you that the stock of the company was worth less than $2.00 a share?

THE WITNESS; I don't believe Dr. Haeberle.

MAGISTRATE RABY: Did you believe him then?

THE WITNESS: No.

MAGISTRATE RABY: Then you can hardly claim reliance on that statement.

THE WITNESS: Let me explain my answer. I don't believe him when he said one, he didn't have financials, because FINCAP is a financial company.

It's obvious an enterprise is running financial partnerships, and it is absolutely impossible to act and carry on their business without continually having financial information. They are the general partner of two partnerships.

MAGISTRATE RABY: The more you say, the deeper you get, sir, because you are disclaiming any reliance on those people and if you are not able to establish reliance, you are out of court.

* * *

MAGISTRATE RABY: Would you refresh my recollection, Mr. Solloway, did you not tell this court a little while ago when Dr. Haeberle had said that the stock was worth less than $2.00 a share you didn't believe him, is that not your testimony, was that not your testimony?

THE WITNESS: Yes, but it was a bad choice, it was a bad phrase. What I mean by that is when I requested the financial information and Haeberle said, "Look, I don't have, we don't have it. We are broke. We haven't made up financial information. We don't have financial information," I knew he was not speaking the truth because he is running partnerships. He is receiving checks every month from the gas fields. He has to have financial information.

That is what I meant to say when he said he doesn't have any financials. I didn't believe him.

MAGISTRATE RABY: In other words, you didn't trust Dr. Haeberle; is that correct?

THE WITNESS: When he said he had no financial information.

* * *

THE WITNESS: What infuriated me was that he was not telling me the truth and not coming before the court and telling that.

MAGISTRATE RABY: If you were so infuriated and if, as you say, you did not trust the man, how did it happen that you were willing to enter into a settlement agreement without insisting in advance that you get written financial information? (A 66-68).

In short, in the face of plaintiff's own testimony under oath, it is sheer understatement at this juncture to even argue that he has not proven fraud by clear and convincing evidence. Plaintiff's own testimony proves his allegations of misrepresentations to be nothing short

of frivolous.*

II.

RULE 60(b)(1), (2) and (6)
AFFORD PLAINTIFF NO RELIEF.

Plaintiff also argues that Judge Ward erroneously limited the Magistrate to the question of fraud, Rule 60(b)(3), while his moving affidavit additionally justified relief under Rule 60(b)(1), (2) and (6). His claims in this regard lack support both in fact and in law.

Judge Ward liberally construed plaintiff's papers as asserting a Rule 60(b) motion as well as relying upon the reopening provision of the order of dismissal (A 38). However, as Judge Ward found in framing the issues to the Magistrate, the disputed issues raised by plaintiff's factual contentions were: (1) whether he was fraudulently induced

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* Plaintiff cites only one case where a judgment was set aside for fraud, Conerly v. Flower, 410 F.2d 941 (8th Cir. 1969), which case is inapposite to the case at bar. There defendant represented that its insurance coverage was $20,000 and settled with one plaintiff, the settlement being conditioned upon defendant proving that fact. However, the case went to the jury anyway since certain plaintiffs did not settle, and the jury rendered a $40,000 verdict for the plaintiff that had settled. When it was later discovered by that plaintiff that defendant's coverage was $40,000, defendant did not contest the setting aside of the settlement agreement. Rather, the only issue on appeal was whether the jury verdict should be substituted for the settlement amount, as plaintiff contended and the lower court held, or whether the Court should order a new trial, as defendant argued.

to settle; and (2) whether he was unable in good faith to fashion a security agreement.* Plaintiff's contentions regarding the first issue obviously were grounded on fraud, and plaintiff's contentions regarding the second issue obviously relied upon the reopening provision of the order of dismissal (A 38-44). Hence, the simple fact is that plaintiff asserted no facts which created any issue under Rule 60(b)(1), (2) or (6).**

Rule 60(b)(1) provides that a party may be relieved from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." The case law makes clear that relief under this section is inappropriate in the situation of a unilateral mistake caused by a party's own neglect. See, e.g., Bershad v. McDonough, 469 F.2d 1333 (7th Cir. 1972); Farmers's Cooperative Elevator Association Non-Stock of Big Springs Nebraska v. Strand, 382 F.2d 224 (8th Cir.), cert. denied, 389 U.S. 1014 (1967); Greenspahn v. Joseph E. Seagram & Sons, 186 F.2d 616 (2d Cir. 1951).

Yet, here, if there was any mistake, surprise or inadvertence, it was clearly on plaintiff's part only, and

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* This second claim by plaintiff, that he was unable in good faith to fashion a security agreement, was rejected by both Magistrate Raby and Judge Ward and apparently has been abandoned upon appeal.

** Plaintiff does not argue, nor could he, that any of his factual contentions were ignored by the Court. To the contrary, both the Magistrate and the Court dealt with each of plaintiff's factual contentions.

it was caused solely by plaintiff's own negligence.* Plaintiff did not have to settle without financials, nor did plaintiff have to rely on FINCAP's verbal statements as to its financial condition. As Judge Ward found:

> Of course settlements can be made without financials, as Magistrate Raby found. In fact, that is what happened in this case, for the furnishing of financials clearly was intended solely for the purpose of facilitating the preparation of a security agreement, not for the purpose of making an ex poste facto (sic) evaluation of the wisdom of the settlement. If the latter is what plaintiff had in mind, then he should have made the settlement expressly contingent upon the production of financials that would substantiate the proffered settlement. "[T]he fact that the wording happened to be omitted at the last second" is unfortunate for plaintiff. The Court will not compensate for plaintiff's lack of foresight by re-writing the parties' agreement concerning the production of financials. (A 70).

Nor is Rule 60(b)(2)'s "newly discovered evidence" provision of any avail to plaintiff. The express language of Rule 60(b)(2) requires that such evidence be "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." E.g., Westerly Electronics Corp. v. Walter Kidde & Co., 367 F.2d 269 (2d Cir. 1966); Greenspahn v. Joseph E. Seagram & Sons, supra. As discussed in regard to Rule

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* In contrast, in United States v. Jordan, 186 F.2d 803 (6th Cir. 1951), aff'd, 342 U.S. 911 (1952), relied upon by plaintiff, the Court affirmed the setting aside by the lower court of a release entered into by the parties on the ground that it was based on a mutual mistake of fact.

60(b)(1), plaintiff could have easily "discovered" defendants financials before settling.*

And, as to Rule 60(b)(6), that section is inapplicable as a matter of law. As was held by the Supreme Court in Klapprott v. United States, 335 U.S. 601, 614-15 (1949), in the precise paragraph quoted and erroneously relied upon by plaintiff (Plaintiff's Brief, p. 16), relief under Rule 60(b)(6) is applicable "for all reasons except the five particularly specified" (emphasis added). Thus, where, as here, plaintiff seeks relief alleging grounds cognizable under 60(b)(1), (2) or (3), relief under Rule 60(b)(6) is precluded as a matter of law. E.g., United States v. Cirami, 77-6021, Slip op. at 5728 (2d Cir., September 1, 1977); Stradley v. Cortez, 518 F.2d 488 (3d Cir. 1975); Petry v. General Motors Corp., 62 F.R.D. 357 (E.D. Pa. 1974).**

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* Furthermore, the express references to a "new trial" and "Rule 59(b)" in Rule 60(b)(2) have caused some courts to question the applicability of Rule 60(b)(2) to settlement agreements. See Westerly Electronics Corp. v. Walter Kidde & Co., supra, and the cases cited therein.

** In Petry, which is also relied upon by Solloway, plaintiff moved the Court to set aside a stipulation of dismissal more than one year later on the ground that defendant falsely answered interrogatories, which answers were relied upon by plaintiff in settling the case. The Court held that the fraud claim could not succeed under Rule 60(b)(3) because over one year had elapsed since entry of judgment, and that it also was not cognizable under Rule 60(b)(6) because fraud is specifically enumerated as being a Rule 60(b)(3) motion.

Moreover, even if Rule 60(b)(6) were applicable to plaintiff's motion, it is far from the catch-all provision plaintiff portrays it as. The scope of Rule 60(b)(6) is "extremely meagre," Rinieri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967), and relief thereunder can only be based on "exceptional" or "extraordinary" circumstances. E.g., Ackerman v. United States, 340 U.S. 193 (1950); United States v. Cirami, supra; Stradley v. Cortez, supra; Loucke v. United States, 21 F.R.D. 305 (S.D.N.Y. 1957). As this Court stated in reversing the lower court's grant of a Rule 60(b)(6) motion in Rinieri v. News Syndicate Co., supra at 823, quoting Ackerman v. United States, supra at 198: "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Plaintiff's decision to settle was such a voluntary, deliberate choice, and relief pursuant to Rule 60(b)(6) would, we submit, be improper.

III.

THERE IS NO BASIS FOR REOPENING THIS CASE PURSUANT TO THE ORDER OF DISMISSAL.

Plaintiff's only remaining claim is that he entered the settlement agreement in reliance upon the order of dismissal, which, according to plaintiff, permits him unilaterally to disavow the settlement for "good cause shown" (Plaintiff's Brief, pp. 9-10). This claim, too, is spurious.

To begin with, the order of dismissal followed rather than preceded the settlement agreement (see pp. 3-6, supra), and hence, plaintiff's claim that he "rel[ied] on the Order" and its reopening provision in entering the settlement agreement is fallacious.

Second, the order, which must be read in conjunction with the settlement agreement, does not permit plaintiff unilaterally to disavow the agreement upon "good cause shown." Plaintiff expressly agreed in open court to a settlement read into the record by his own attorney, whereby he would receive $30,000 over a period of five years, and upon full payment would surrender his shares of FINCAP (A 21-23). There was absolutely no condition precedent to this settlement; the plain words of the agreement indicate that it is final in this regard.

The only open portion of the settlement was the parties' agreement to arrive at a security instrument to secure payment of the agreed-upon monies (A 22). And, "in working out the security arrangement . . . defendants . . . agreed to furnish financial statements. . . ." (A 22). The Court, in the order of dismissal, allowed the parties 30 days within which to reopen the action in the event of a disagreement with respect to the security arrangement (A 24, 19). Thus, as Magistrate Raby and Judge Ward found, in accordance with the explicit words of the settlement agreement,

the reopening clause of the dismissal order was intended to take effect solely if the parties could not in good faith fashion a security instrument, and the production of financials to plaintiff was intended solely for his use in the preparation of the security agreement (A 52-53, 70-72). Indeed, there is absolutely no evidence in the record, aside from plaintiff's bald assertions, that a condition precedent to the finality of the settlement agreement was the receipt of financials or that the settlement could be unilaterally disregarded by either party.*

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* Aro Corp. v. Allied Witan Co., 65 F.R.D. 513, 515 (N.D. Ohio 1975), aff'd, 531 F.2d 1368 (6th Cir.), cert. denied, 429 U.S. 862 (1976) is erroneously relied upon by plaintiff (Plaintiff's Brief, p. 16). The Court in Aro set aside the final judgment of dismissal in order to decree specific performance of the settlement agreement over the appellee's claim that a condition precedent to the agreement had not been complied with:

> The interests of justice mandate . . . specific performance of the settlement agreement, which is plainly written and open to no serious doubts as to its meaning. The claim of the defendant that plaintiff has not performed a condition precedent to the written agreement thereby relieving the defendant of its duties is specious in light of the parol evidence rule. This claim has no merit.

Similarly, in Kelly v. Greer, 334 F.2d 434 (3d Cir. 1964) also erroneously relied on by plaintiff (Plaintiff's Brief, p. 16), it was the appellee who refused to carry out the settlement. The Court vacated the lower court's dismissal order in order to reinstate the status quo existing after the settlement, thus enabling the district court to enforce the settlement agreement. Nor is L.M. Leathers' Sons v. Goldman, 252 F.2d 188 (6th Cir. 1958) of any aid to plaintiff. There, the lower court's dismissal was conditioned upon plaintiff-appellee receiving a patent license from the defendant-appellant, and when the defendant subsequently refused to grant the license, the plaintiff's motion to reopen the case was granted.

Finally, even assuming arguendo that plaintiff's out of context reading of the settlement agreement were correct, there is no evidence in the record of any showing of "good cause" enabling plaintiff to walk away from his agreement. Plaintiff's claim of "good cause" is based wholly upon the same alleged representations as his fraud claim (Plaintiff's Brief, pp. 11-12), and as shown supra at pp. 13-18, there is no factual support for that claim.

In sum, it is apparent that this appeal is an attempt by plaintiff to avoid a settlement agreement knowingly and willingly entered into by him solely because it is no longer attractive to him. The law, of course, does not permit this. E.g., Clarion Corp. v. American Home Products Corp., supra; Sampson v. Radio Corp. of America, supra. To the contrary, litigation has to end sometime, and the law encourages the compromise and settlement of disputes. E.g., Williams v. First National Bank, 216 U.S. 582, 595 (1910); Newman v. Stein, 464 F.2d 689 (2d Cir.), cert. denied, 409 U.S. 1039 (1972). Here, plaintiff freely chose to enter a settlement with defendants having no prior condition. He should, we submit, be bound by his choice.

CONCLUSION

The decision of the District Court, denying plaintiff's motion to reopen this action, should be affirmed.

Respectfully submitted,

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ADDENDUM

RULE 60

RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C , § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Russell Selby, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party hereto;

2. On the 25th day of October, 1977 I served the annexed Brief upon the attorney named below by personally delivering two copies thereof to him at the address specified for service of papers, as follows:

William J. Solloway
18 East 68th Street
New York, New York

Russell Selby

Sworn to before me this
25th day of October, 1977

William D Hancock
Notary Public

WILLIAM D. HANCOCK
Notary Public, State of New York
No. 31-4647870
Qualified in New York County
Commission Expires March 30, 1979